



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-38*

FACTS:

The Executive Office of Economic Affairs (EOEA) proposes to develop an Industry Specialist Program (Program). This program will be administered by the Massachusetts Office of Business Development (MOBD), which is an agency within EOEA. The purpose of the program would be to hire, as independent state contractors, a biotechnology specialist and a telecommunications specialist to provide companies with information concerning the Commonwealth's permitting and regulatory processes, to assist in expediting the Commonwealth's review processes and to coordinate any financial assistance to which the companies may be eligible. The specialists will also assist in marketing the Commonwealth as a site for biotechnology and telecommunications, assist in the development of international business for Massachusetts biotechnology and telecommunications companies, and assist the Secretary of EOEA in the development of policy concerning the biotechnology and telecommunications industries.

EOEA proposes to fund these positions by soliciting funds from industry representatives in the biotechnology and telecommunications industries. Funds received through this solicitation from the biotechnology industry may be earmarked for the biotechnology specialist and solicited funds from the telecommunications industry may be earmarked for the telecommunications specialist, but no funds will be earmarked for a specific, named individual. The Director of MOBD will disclose all of the names of the contributors to the program to the Secretary of EOEA and to the State Ethics Commission.

Any companies or trade associations which donate funds will not refer or recommend specific individuals for the specialist positions. However, MOBD is considering a plan to consult with one or more of the executives from the contributing companies concerning the finalist for a specialist position. MOBD would ask the executives to review the finalist's resume and interview the finalist in order to provide MOBD with an opinion concerning the individual's depth of knowledge of the industry. The final decision regarding whether to hire a particular candidate would remain with MOBD.

QUESTION:

Does G.L. c. 268A permit EOEA and MOBD to solicit funds from private businesses within the telecommunications and biotechnology industry in order to fund this agency program?

ANSWER:

Yes.

DISCUSSION:

Employees of MOBD and EOEA are state employees under the conflict of interest statute. G.L. c. 268A, §1(q). Section 3 of G.L. c. 268A provides, in pertinent part, that a state employee may not, otherwise than as provided for by law for the proper discharge of official duties, ask, demand, seek, solicit or accept anything of substantial value for himself, for or because of any official action or action to be performed.

The Commission has previously recognized that the prohibitions of §3 apply only if the official is receiving something for himself, and that §3 is not violated where a donor provides for the use of an agency a gift which is not targeted to a particular public employee. *See EC-COI-87-23* (§3 not violated where public official received

no personal benefit from fee which reverted to trust established by official); 92-7; 89-23 (potential state vendor donated software for use of agency, not individual); 84-114 (donation of art work to agency, not employee). In each of the Commission's agency gift cases, the donation was not targeted directly for the personal use of a particular employee, and the gift was subject to the control and oversight of the agency, thus dispelling an appearance that the donor was attempting to gain the goodwill of any particular employee. *See EC-COI-87-38. Compare, EC-COI-92-37* (discount targeted for use of particular state employee and subject to control of individual, not agency).

We conclude that the proposed solicitation will not violate §3 because the solicitation is not for the benefit of an individual, but rather will go into a government fund which will benefit the agency. *See EC-COI-92-28 n.1; 89-23; 89-3; 84-114.* The selection process for the specialists and the allocation of the funds is within the control of EOEa, and no funds will be specifically earmarked for an individual.

Additionally, we have consistently stated that, under §3, a public employee may solicit or accept funds from a private entity with whom the employee has (or may have) official dealings if a statute or regulation expressly authorizes the agency to accept gifts or permits a public employee to solicit funds. *See e.g., EC-COI-92-28; 92-20; 92-10.* In these limited circumstances, the gift or solicitation is "as provided by law for the proper discharge of official duty."

We conclude that the proposed solicitation by MOBD is "provided by law for the proper discharge of official duty." G.L. c. 23A, §8 provides that "MOBD may accept gifts or grants of money or property from any source, which shall be held in trust for the use of MOBD by the secretary of economic affairs as custodian." Implicit in the language of this statute is the idea that, if the agency may accept a grant, then it may seek out grant sources and apply for funds. *See EC-COI-84-128* (soliciting funds on behalf of government program a reasonable extension of state official's official duties where statute authorized official to apply for and accept gifts or grants). Further, the proposed use of the solicited funds is consistent with MOBD's statutory mandate^{1/} and will directly further the agency's work.

The proposed solicitation also presents issues under G.L. c. 268A, §23. Section 23(b)(2) provides, in pertinent part, that no public employee may use his official position to secure unwarranted privileges or exemptions for himself or others. Under this section, MOBD employees must take care, in their future official dealings with any of the contributing companies, to review matters affecting those companies using the same objective standards that they use for all such matters. *EC-COI-89-23; 89-3.*^{2/}

Section 23(b)(3) prohibits a state employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. *EC-COI-89-23; 89-19; 84-128.* In their future dealings with contributing organizations, MOBD employees should avoid giving the impression that contributing companies can influence their discretion or decisions in any way. *EC-COI-89-3* (to dispel appearance of undue favoritism agency should publicly disclose that vendor provided agency with a gift); *EC-COI-84-114* (if agency has subsequent dealings with donor should notify appointing authority of gift to the agency). In order to dispel the appearance of a conflict, §23 (b)(3) requires that EOEa and MOBD employees who will have official dealings with the contributors in the future file a written disclosure with their appointing authority prior to participating in such a matter. *See EC-COI-91-3; 90-2; 89-19.* Your proposed procedure to file a disclosure, identifying all of the contributing companies, with the Secretary of EOEa and the State Ethics Commission complies with the requirements of §23(b)(3).^{3/}

DATE AUTHORIZED: November 5, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}According to G.L. c.23A, §2,

MOBD shall serve as the principal agency of the government of the commonwealth for the following purposes:

- (a) promoting, developing and expanding all sectors of the economy by capitalizing on and fostering the technological, industrial, manufacturing, educational, cultural and geographic advantages of the commonwealth in the world economy.

(b) providing a full and effective range of business services to Massachusetts' businesses, including assuring the availability of the capital and human resources required for growth and development in the commonwealth...

(f) attracting new and expanding manufacturing industries to Massachusetts, especially to those regions of the commonwealth with an eroding traditional manufacturing base.

²We note that the proposed solicitation will not violate G.L. c. 268A, §23(b)(2) because the solicitation is authorized by statute, and thus is a reasonable extension of MOBD employees' official duties. In addition, the solicitation is solely for the benefit of a government program and not to benefit a private party. Compare *EC-COI-92-28* (solicitation prohibited under §23 as not authorized by statute and benefits a private non-profit organization) with *EC-COI-84-128* (state Secretary permitted to solicit private entities based on presence of explicit statutory authorization and benefit to government sponsored initiative).

³You question whether MOBD or EOEA employees may consult with contributors concerning the finalist for the specialist position. G.L. c. 268A will not prohibit such a consultation. This advice is limited to an application of G.L. c. 268A and is not intended to comment on the appropriateness of such a hiring policy by MOBD.